

DISTRICT COURT, JEFFERSON COUNTY, STATE OF COLORADO Court Address: 100 Jefferson County Parkway Golden, CO 80401 Telephone No.: (720) 772-2500		DATE FILED: August 20, 2019 8:54 PM FILING ID: 617C70BCFEAB9 CASE NUMBER: 2019CV30887
Plaintiff: BIG SKY METROPOLITAN DISTRICT NO 1, a quasi-municipal corporation and political subdivision of the State of Colorado, v. Defendant: GREEN MOUNTAIN WATER AND SANITATION DISTRICT, a quasi-municipal corporation and subdivision of the State of Colorado.		▲COURT USE ONLY▲ Case No.: 2019CV030887 Div./Ctrm: 2
<i>Counsel for Plaintiff:</i> Charles E. Norton, #10633 NORTON & SMITH, P.C. 1331 17 th Street, Suite 500 Denver, Colorado 80202 Telephone Number: (303) 292-6400 Facsimile Number: (303) 292-6401 E-mail: CNorton@NortonSmithLaw.com <i>Counsel for Defendant:</i> Mary Joanne Deziel Timmins, #13859 DEZIEL TIMMINS LLC 450 East 17th Avenue, Suite 210 Denver, Colorado 80203 Telephone: (303) 592-4500 Facsimile: (303) 592-4515 E-mail: jt@timminslaw.com		
PROPOSED CASE MANAGEMENT ORDER		

Pursuant to C.R.C.P. 16(b), the parties should discuss each item below. If they agree, the agreement should be stated. If they cannot agree, each party should state its position briefly. If an item does not apply, it should be identified as not applicable.

This form shall be submitted to the court in editable format. When approved by the court, it shall constitute the Case Management Order for this case unless modified by the court upon a showing of good cause.

This form must be filed with the court no later than 42 days after the case is at issue and at least 7 days before the date of the case management conference.

The case management conference is set for August 28, 2019 at 1:00 p.m.

1. The “at issue date” is July 23, 2019.
2. Responsible attorney’s name, address, phone number and email address: Charles E. Norton, Norton & Smith, P.C., 1331 17th Street, Suite 500, Denver, Colorado 80220. Telephone No. (303) 292-6400; Email Address cnorton@nortonsmithlaw.com.
3. The lead counsel for each party, Mary Joanne Deziel Timmins, Deziel Timmins, LLC, for Defendant Green Mountain Water and Sanitation District, and Charles E. Norton, Norton & Smith, P.C., for Plaintiff Big Sky Metropolitan District No. 1, met and conferred in person at the offices of Plaintiff’s counsel concerning this Proposed Order and each of the issues listed in Rule 16(b)(3)(A) through (E) on August 2, 2019.
4. Brief description of the case and identification of the issues to be tried (not more than one page, double-spaced, for each side):

Big Sky Metropolitan District No. 1 (“Big Sky”) identifies the following issues to be tried:

This case concerns the “Intergovernmental Agreement for Extra-Territorial Sewer Service” (the “Big Sky/Green Mountain IGA”) that was entered into on May 8, 2018 between Big Sky and Defendant Green Mountain Water and Sanitation District (“Green Mountain”). Green Mountain agreed to accept Wastewater from Big Sky, which is collected from and generated within the Big Sky Service Area and Big Sky Expanded Service Area and does not exceed a peak hour flow rate of 1.267 MGD, pursuant to all of the terms contained in the IGA. The Big Sky Service Area includes properties within the boundaries of the City of Lakewood and currently owned by CDN Red Rocks, LP and Cardel Homes. The Big Sky Expanded Service Area includes property owned by 3 Dinos, LLC located in unincorporated Jefferson County.

Green Mountain and Big Sky worked together closely to make the IGA a reality. They litigated against Fossil Ridge Metropolitan District No. 1 and reached agreement with that District about the amount it should be reimbursed for having oversized its sanitary sewer system to accommodate sewage flows from the Big Sky Service Area and Big Sky Expanded Service Area, which had been done at the insistence of Green Mountain in a

prior intergovernmental agreement between Fossil Ridge and Big Sky. Big Sky paid all of Green Mountain's expenses associated with this litigation as well as all engineering costs associated with the Big Sky/Green Mountain IGA.

Despite the clear public benefit of the Big Sky/Green Mountain IGA, including generating tap fees and user charges that would help Green Mountain pay for improvements to its sanitary sewer system at no additional expense to the customers and residents of Green Mountain, the Green Mountain Board of Directors voted to repudiate the IGA at a regular meeting held on April 9, 2019. Big Sky has pled that this action was a breach of the Big Sky/Green Mountain IGA; that Green Mountain's conduct violated the covenant of good faith and fair dealing contained in every contract entered into in Colorado; and that the Green Mountain Board resolution repudiating the IGA violated the prohibition against retrospective legislation set forth in Article II, section 11 of the Colorado Constitution. Big Sky also seeks damages under the doctrine of promissory estoppel, citing a number of actions that it took in reasonable reliance on Green Mountain's promise to provide sanitary sewer service, including paying all of Green Mountain's expenses incurred in connection with the Fossil Ridge litigation and expending money for engineering expenses to conclude the Big Sky/Green Mountain IGA.

Green Mountain Water and Sanitation District (“Green Mountain”) identifies the following issues to be tried:

This case involves the enforceability of an intergovernmental agreement that was void from its inception because it violated the Special District Act, the Local Government Budget Law, and the Colorado Constitution Articles V and XIV, among several other reasons. The IGA was approved by members of a board of directors minutes before they were being voted out of office, under pressure to do so, well before material terms of the agreement

had been determined, and without adhering to the limitations on the power of governmental entities. The issues for trial include:

1. Whether the IGA is void because it violated the Local Government Budget Act, C.R.S. §29-1-101 *et seq.* because it failed to include anticipated expenditures in the annual budget;
 2. Whether the IGA is void because it constituted a material modification of the Big Sky Service Plan in violation of C.R.S. §32-1-207 of the Special District Act;
 3. Whether the IGA is void under the Colorado Constitution Article V, as an improper delegation of legislative authority by Big Sky, and Article XIV, as a violation of the limitation on intergovernmental agreements;
 4. Whether the IGA is void because it was not adopted by formal resolution in violation of C.R.S. §29-108 and 113;
 5. Whether the IGA is void because the prior board of directors improperly delegated its legislative function to its district manager;
 6. Whether the IGA is unenforceable because it is an executory contract missing material terms that had not been determined;
 7. Whether specific performance is available as a remedy against a governmental entity;
 8. Whether promissory estoppel is available based on an agreement that was void, or whether reliance is reasonable when dealing with a governmental entity whose published rules and regulations permit the revocation of prior resolutions;
 9. Whether the exclusive jurisdiction of this court for review of Green Mountain's termination of the IGA was an action under C.R.C.P. 106, which action is now time barred;
 10. Whether termination of a void agreement constitutes retrospective legislation.
5. The following motions have been filed and are unresolved:
- No motions are pending at this time.
6. Brief assessment of each party's position on the application of the proportionality factors, including those listed in C.R.C.P. 26(b)(1):

Big Sky's position: The parties have agreed upon a modest expansion of the discovery limits set forth in C.R.C.P. 26(b)(1), consisting of increasing the number of depositions of persons other than an expert and the parties from two to four. Big Sky believes that the

issues to be tried are of great importance and that if sanitary sewer service cannot be obtained through the Big Sky/Green Mountain IGA private properties within Big Sky will be rendered valueless. Big Sky's monetary damages for promissory estoppel are believed to be in excess of \$700,000.00 as of the date of this case management order, consisting of attorney's fees, engineering costs, and related expenses incurred by Big Sky to develop and implement the IGA. Both sides have relatively equal access to relevant information, although information relating to Green Mountain's intergovernmental agreement with Fossil Ridge is entirely in the possession of Green Mountain. Both parties have resources sufficient to conduct this discovery. Big Sky believes that the deposition of Nina Cudahy, Green Mountain's former manager, may help to establish a narrative of events surrounding the April 9, 2019 Green Mountain resolution terminating the Big Sky/Green Mountain IGA which could in turn serve as a foundation for motions for summary judgment that might shorten or eliminate the need for a trial, thus conserving the parties' resources.

Green Mountain's Position on Proportionality Factors: With respect to the proportionality factors, Green Mountain believes: (1) the determination of the enforceability of the Big Sky IGA is important because Big Sky is attempting to enforce an agreement that was void from its inception due to the failure of governmental entities to adhere to statutory and constitutional limitations in the exercise of their powers; (2) Big Sky's alleged damages are based on principles of promissory estoppel which cannot be enforced based on a void agreement, and also cannot be enforced against a governmental entity; (3) The parties have equal access to relevant information; (4) Both parties have sufficient resources to conduct discovery. Green Mountain agrees that the validity of the Big Sky IGA could be considered on a motion for summary judgment that could eliminate the need for a trial or shorten the length of a trial.

7. The lead counsel for each party, Charles E. Norton and Mary Joanne Deziel Timmins, along with Green Mountain's consultant regarding special districts, John Henderson, met and conferred concerning possible settlement. The prospects for settlement are: remote at this stage of the process.

8. Deadlines for:

a. Amending or supplementing pleadings: (Not more than 105 days (15 weeks) from at issue date.) November 5, 2019

b. Joinder of additional parties: (Not more than 105 days (15) weeks from at issue date.) November 5, 2019

c. Identifying non-parties at fault: The parties do not believe that section 13-21-111.5, C.R.S. is applicable to this case which involves contractual, quasi-contractual, and constitutional theories. However, in the event disclosure is required, it should be made within 90 days of the commencement of the action, September 4, 2019.

9. Dates of initial disclosures: Initial disclosures were served the same day that the draft of this order is due, August 20, 2019. Objections, if any, about their adequacy: None pending, although the parties have not yet had time to review the disclosures as of the date of this draft order.

10. If full disclosure of information under C.R.C.P. 26(a)(1)(C) was not made because of a party's inability to provide it, provide a brief statement of reasons for that party's inability and the expected timing of full disclosures: the parties anticipate being able to make full disclosure on August 20, 2019. The completion of discovery on damages is anticipated by the discovery cut-off date 49 days before trial as provided in C.R.C.P. 16 (b)(11).

11. Proposed limitations on and modifications to the scope and types of discovery, consistent with the proportionality factors in C.R.C.P. 26(b)(1): The parties propose an increase in the number of depositions of "others" from 2 to 4. Other than that modification, the parties will adhere to the limitations set forth in C.R.C.P. 26(b)(2).

Number of depositions per party (C.R.C.P. 26(b)(2)(A) limit 1 of adverse party + 2 others + experts per C.R.C.P. 26(b)(4)(A)): The parties will adhere to these limits except that they will be permitted to take the deposition of 4 others.

Number of interrogatories per party (C.R.C.P. 26(b)(2)(B) limit of 30): The parties will be limited to the 30 interrogatories called for by the rule.

Number of requests for production of documents per party (C.R.C.P. 26(b)(2)(D) limit of 20): The parties will be limited to the 20 requests called for by the rule.

Number of requests for admission per party (C.R.C.P. 26(b)(2)(E) limit of 20): The parties will adhere to the limit of 20 requests all called for by the rule. In addition, they may serve requests for the admission of the genuineness of up to 50 separate documents that they intend to offer into evidence at trial, as provided for in C.R.C.P. 26(b)(2)(E).

Any physical or mental examination per C.R.C.P. 35: None anticipated.

Any limitations on awardable costs: None proposed.

State the justifications for any modifications in the foregoing C.R.C.P. 26(b)(2) limitations: Big Sky anticipates the need for a deposition of Ms. Cudahy, of one or two members of the Green Mountain Board of Directors, of Mr. Henderson, who was retained by Green Mountain as a consultant and who previously advocated the termination of the Big Sky/Green Mountain IGA, and of either Mr. Ed Icenogle or Ms. Jennifer Ivey of the firm of Icenogle Seaver Pogue, P.C., which served as general counsel to Green Mountain before being terminated by the Green Mountain Board of Directors. Because of the change in the composition of the Green Mountain Board of Directors, it may take additional depositions of others beyond the scope of a 30 (b)(6) deposition of the parties for the two sides to discover a complete picture of what happened when the IGA was terminated.

Green Mountain's Justification for Modification to C.R.C.P. 26(b)(2) Limitations:

Green Mountain agrees with the proposed discovery plan under which the parties will adhere to the limitations set forth in C.R.C.P. 26(b)(2) except that the parties will increase the number of depositions of “others” from 2 to 4. The justification for this modification to the C.R.C.P. 26(b)(2) limitations is the fact that this case involves special districts which are public entities that are governed by boards of directors and district managers, and the proposed Big Sky IGA was drafted with the input of numerous individuals over a lengthy period of time.

12. Number of experts, subjects for anticipated expert testimony, and whether experts will be under C.R.C.P. 26(a)(2)(B)(I) or (B)(II):

Big Sky anticipates calling a certified public accountant to testify regarding its damages. This individual will most likely be someone already retained by Big Sky to certify costs that are “district eligible” under the Special District Act, and so would fall within C.R.C.P. 26(a)(2)(B)(II). Big Sky also anticipates calling an expert with regard to the proposed water and sewer improvements that are to be installed under the Big Sky/Green Mountain IGA and to describe the existing Green Mountain sanitary sewer system. While engineering analyses have already been prepared, Big Sky will most likely call a retained expert under C.R.C.P. 26(a)(2)(B)(I).

Green Mountain anticipates calling a sanitary sewer system engineer to testify regarding the Green Mountain sanitary sewer system and proposed improvements to the system under the Big Sky IGA. This individual may be someone already retained by Green Mountain and thus would fall within C.R.C.P. 26(a)(2)(B)(II).

If more than one expert in any subject per side is anticipated, state the reasons why such expert is appropriate consistent with proportionality factors in C.R.C.P. 26(b)(1) and any differences among the positions of multiple parties on the same side: The parties do not anticipate more than one expert per subject per side.

13. Proposed deadlines for expert witness disclosure if other than those in C.R.C.P. 26(a)(2)

a. production of expert reports:

- i. Plaintiff/claimant: Big Sky will adhere to the C.R.C.P. 26(a) (2) deadline of 126 days before the trial date.
- ii. Defendant/opposing party: Green Mountain will adhere to the C.R.C.P. 26(a) (2) deadline of 28 days after service of Big Sky’s disclosures, unless Big Sky serves its disclosure earlier than required under subparagraph 26(a)(2)(C)(II), in which event Green Mountain will not have to serve its disclosure until 98 days before the trial date.

b. production of rebuttal expert reports: This disclosure will be made pursuant to C.R.C.P. 26 (a)(2)(C)(III), no later than 77 days before the trial date.

- c. production of expert witness files: the files shall be produced at the time that expert reports are filed, subject to the limitations set forth in C.R.C.P. 26 (b)(4)(D).

State the reasons for any different dates from those in C.R.C.P. 26(a)(2)(C): No different dates are proposed by the parties.

14. Oral Discovery Motions. The court (does)(does not) require discovery motions to be presented orally, without written motions or briefs. _____

15. Electronically Stored Information. The parties do not anticipate needing to discover a significant amount of electronically stored information. The following is a brief report concerning their agreements or positions on search terms to be used, if any, and relating to the production, continued preservation, and restoration of electronically stored information, including the form in which it is to be produced and an estimate of the attendant costs.

The parties will make electronic copies of documents that are listed in their disclosures and in response to requests for production of documents. These will then be transmitted to the opposing party by email or through links to storage in the cloud.

16. Parties' best estimate as to when discovery can be completed: Assuming a trial date no later than June of 2019, discovery can be completed 49 days prior to trial as provided for in C.R.C.P. 16 (b)(11).

Parties' best estimate of the length of the trial: The parties estimate that the trial will take 3 days.

Trial will commence on (or will be set by the court later): _____

17. Other appropriate matters for consideration: Within 35 days after filing of the proposed Case Management Order, the parties shall schedule mediation with a mediator of their choice and file a Notice of Mediation Setting that provides the name of the mediator and the date of the scheduled mediation. Within 7 days after mediation, a Notice of Mediation Completion shall be filed that contains a status report regarding mediation. The Court will consider extending these time periods and/or waiving the mediation requirement upon timely filing of a motion showing good cause.

By checking this box, I am acknowledging I am filling in the blanks and not changing anything else on the form.

By checking this box, I am acknowledging that I have made a change to the original content of this form.

Dated this 20th day of August, 2019

NORTON & SMITH, P.C.

s/ Charles E. Norton
Charles E. Norton, #10633
Counsel for Plaintiff

DEZIEL TIMMINS, LLC

s/ Mary Joanne Deziel Timmins
Mary Joanne Deziel Timmins, #13859

CASE MANAGEMENT ORDER

IT IS HEREBY ORDERED that the foregoing, including any modifications made by the court, is and shall be the Case Management Order in this case.

Dated this _____ day of _____, 2019.

BY THE COURT:

District Court Judge